A

TAN AH TONG

v.

GEE BOON KEE & ORS

B

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
ALAUDDIN MOHD SHERIFF JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: W-02-287-2000]

C

14 DECEMBER 2005

CIVIL PROCEDURE: *Trial - New trial - Circumstances under which new trial should be held - Whether absence of trial court's grounds of judgment on appeal a sufficient reason to hold a new trial*

D

CIVIL PROCEDURE: *Appeal - Grounds of judgment - Grounds of judgment not available on appeal - Approach of appellate court - Whether appellate court ought to order a new trial in such circumstances*

CIVIL PROCEDURE: *Judgment - Grounds of judgment - Grounds of*
E *judgment not prepared by trial judge - Whether decision unsafe - Whether new trial ought to be ordered where such judgment appealed against*

The plaintiffs and defendants 4-6 were purchasers of 40 bungalow sublots on 2 lots of land owned and developed by the vendors
F (defendants 1-3). Pursuant to the sale and purchase agreements, the vendors undertook to apply for the conversion of their two lots of land to building use and to subdivide the 2 lots into 41 individual lots. However, the first defendant instead charged the 2 lots to a bank and applied to subdivide the land into 55 bungalow
G lots and 1 lot for a 60-unit condominium. The purchasers sought to declare the first defendant as their constructive trustee over the 2 lots of land and sued to compel the first defendant to perform all the obligations of the vendors under the sale and purchase agreements. On 13 May 1994, the High Court reserved judgment.
H On 23 January 1997, the statement of claim was amended. Judgment was again reserved on 12 August 1998. On 15 May 2000, the High Court gave judgment for specific performance for 28 purchasers against defendants 1-3, although such order was only sought against the first defendant. No order was made for
I defendants 4-6 who were also purchasers. The judge did not make the declaratory order sought by the purchasers. He did not deliver grounds of judgment as he retired soon after delivering the

judgment. Three appeals were filed in the Court of Appeal against the decision of the High Court. The first appeal was filed by the first defendant. The second appeal was preferred by the second and third defendants whereas the third appeal was commenced by defendants 4-6 who appealed contending that specific performance should have been ordered for them as well. The Court of Appeal proceeded with the first appeal (by the first defendant) wherein counsel solely argued for a new trial of the action as a result of the absence of the High Court's grounds of judgment.

Held (dismissing the appeal with costs)
Per Abdul Aziz Mohamad JCA:

(1) Where a judge does not state his reasons for arriving at his decision, the decision is not necessarily unsafe. He may have properly considered and weighed the evidence and may have arrived at the right conclusions. The decision is only unsafe in the sense that the appellate court is unable to determine, from an assessment of the judge's mental processes, that the decision is correct. However, it does not follow that the course open to the appellate court is to order a new trial. It is still open to the appellate court to assess the evidence and come to a finding whether or not the evidence vindicates the decision of the trial judge. (para 11)

(2) Where, in an appeal, reasons for the decision appealed against are not available, the appeal should proceed on an examination and assessment of the evidence to enable the appellate court to decide whether the evidence justifies the decision or otherwise. It is as if the appellate court is sitting at first instance, except that the evidence is already before it. A new trial is undesirable and ought not to be ordered unless there is something crucial to a just decision in the case that can be established in the new trial, but cannot be established on an assessment of the evidence, such as the credibility of non-expert witnesses. (para 12)

(3) In the instant case, there was the alternative assessment of evidence by the appellate court. Counsel had not justified the appellant's plea for a new trial. (paras 14 & 15)

Bahasa Malaysia *translation of headnotes*

Plaintif-plaintif serta defendan-defendan keempat hingga keenam adalah pembeli-pembeli 40 lot banglo atas tanah yang dimiliki dan dibangunkan oleh defendan-defendan pertama hingga ketiga ('penjual'). Berdasarkan kepada satu perjanjian jual beli, penjual berjanji untuk memohon penukaran syarat dua bidang tanah mereka kepada kegunaan bangunan dan memecahkannya menjadi 41 lot-lot kecil. Defendan pertama, bagaimanapun, tidak menunaikan janjinya. Ia sebaliknya menggadai kedua-dua lot tersebut ke bank dan memohon untuk memecahkannya kepada 55 lot banglo sementara 1 lot dikhaskan untuk 60 unit kondominium. Pembeli memohon untuk mengisytiharkan defendan pertama sebagai pemegang amanah konstruktif mereka, dan memfailkan guaman bagi memaksa defendan pertama memenuhi obligasinya terhadap pembeli di bawah perjanjian jual beli. Pada 13 Mei 1994, Mahkamah Tinggi telah menangguhkan keputusan. Pada 23 Januari 1997, pernyataan tuntutan telah dipinda. Pada 12 Ogos 1998, sekali lagi keputusan telah ditangguhkan. Pada 15 Mei 2000, Mahkamah Tinggi membenarkan pelaksanaan spesifik kepada 28 pembeli terhadap defendan-defendan pertama hingga ketiga, walaupun perintah sedemikian hanya dipohon terhadap defendan pertama. Sementara itu, tiada perintah dibuat bagi defendan-defendan keempat hingga keenam, walaupun mereka juga adalah pembeli-pembeli. Seterusnya, hakim tidak membuat perintah periystiharan yang dipohon oleh pembeli-pembeli. Beliau juga tidak memberikan alasan penghakimannya kerana telah bersara sejurus selepas menyampaikan keputusannya. Rayuan-rayuan di sini difailkan di Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi. Rayuan pertama difail oleh defendan pertama. Rayuan kedua difail oleh defendan-defendan kedua dan ketiga, sementara rayuan ketiga difail oleh defendan-defendan keempat hingga keenam yang menyatakan bahawa pelaksanaan spesifik harus juga dibenarkan untuk mereka. Mahkamah Rayuan mendengar rayuan pertama (oleh defendan pertama) di mana peguam berhujah bahawa, disebabkan oleh ketiadaan alasan penghakiman Mahkamah Tinggi, suatu perbiaraan semula harus diperintahkan terhadap kes ini.

Diputus (menolak rayuan dengan kos)
Oleh Abdul Aziz Mohamad HMR:

(1) Di mana hakim tidak menyatakan alasan-alasan dalam mencapai keputusannya, keputusannya itu tidak semestinya tidak selamat. Beliau mungkin telah menilai keterangan-keterangan dengan

sewajarnya dan telah mencapai suatu keputusan yang betul. Keputusannya hanya tidak selamat dalam erti kata mahkamah rayuan tidak dapat menentukan sama ada keputusannya itu, dari segi proses penilaian secara mental yang dibuat oleh beliau, adalah betul. Apapun, ianya tidak semestinya mengikut bahawa mahkamah rayuan harus memerintahkan suatu perbicaraan semula. Ianya masih terbuka kepada mahkamah rayuan untuk menilai keterangan dan mencapai keputusan sama ada keterangan yang ada mewajarkan keputusan yang dicapai oleh hakim bicara.

(2) Di mana, dalam suatu rayuan, alasan-alasan bagi keputusan yang dicapai tidak ada, rayuan harus diteruskan dengan mahkamah rayuan memeriksa dan menilai keterangan bagi membolehkannya membuat keputusan sama ada keputusan diwajarkan oleh keterangan. Ianya seolah-olah mahkamah rayuan mendengar perbicaraan di peringkat awal, kecuali bahawa keterangan sudahpun berada di hadapannya. Perbicaraan semula bukanlah penyelesaian yang baik dan tidak harus diperintahkan kecuali jika terdapat sesuatu yang penting yang hanya dapat dibuktikan di perbicaraan semula, dan tidak melalui penilaian semula keterangan, seperti kebolehpercayaan saksi-saksi bukan pakar.

(3) Dalam kes semasa, terdapat jalan alternatif iaitu penilaian keterangan oleh mahkamah rayuan. Peguam gagal memberikan alasan-alasan bagi mewajarkan suatu perbicaraan semula.

Case(s) referred to:
English v. Emery Reimbold & Strick Ltd [2002] 2 All ER 385 ***(refd)***
Flannery v. Halifax Estate Agencies Ltd [2000] 1 All ER 373 ***(refd)***
Tan Hun Wah v. PP [1994] 2 CLJ 181 SC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 71(1)

For the appellant - Tommy Thomas (K Goik & KW Moh with him); M/s Nasir Kenzin & Tan
For the respondents no. 1, 4, 7, 9, 10, 13, 16, 19, 27 - Jagjit Singh Gill; M/s Putra Gill
For the rest of the respondents except no. 29 - C Jegathesan (Asmah Azhari with him); M/s C Jegathesan
For the appellants in Appeal No. W-02-288-00 - Won Walter Pereira; M/s Kamaruddin & Partners

A *For the appellants in Appeal No. W-02-289-00 - Balbir Singh; M/s KY Thong & Co*

[Appeal from High Court, Kuala Lumpur; Originating Summons No: F31-90-1986]

B *Reported by Andrew Christopher Simon*

JUDGMENT

C **Abdul Aziz Mohamad JCA:**

[1] In the High Court there were twenty-nine plaintiffs and six defendants. Against defendants 1, 2 and 3 ("the vendors") plaintiffs 1 to 28 obtained an order of specific performance of sale and purchase agreements in respect of unsubdivided lots of agricultural land. Being unsubdivided, we shall refer to these lots as "sublots".

[2] The following is a summary of the core averments in the amended statement of claim. In 1973 the vendors bought two agricultural lands in the Mukim of Hulu Kelang, District of Gombak, Selangor, which we shall refer to simply as Lots 512 and 513, in order to carve out of them forty-one bungalow sublots to be sold. The vendors caused to be drawn up a layout plan of the forty-one sublots and a standard cyclostyled form of sale and purchase agreement to which the layout plan was annexed to form part of it. The forty-one sublots were soon sold out. A sale and purchase agreement in the form drawn up as mentioned was executed for each sublot. The buyers of forty of the sublots were the twenty-nine plaintiffs (treating, for convenience, plaintiffs 19 and 23, who were actually substitutes of deceased plaintiffs, as buyers), and defendants 4, 5, 6, several of them buying more than one sublot. All that happened before the transfer of Lots 512 and 513 from the original owner was registered. The registration took place on 15 August 1973. Only defendant 1, one of the three vendors, was registered as the proprietor, who soon after regarded himself as the sole vendor. Although the forty-one sublots had been paid for in full, and there was an undertaking in the sale and purchase agreements that the vendors would apply for conversion of Lots 512 and 513 to building land and for their subdivision into forty-one lots, the undertaking was not fulfilled. Instead, on 11 February 1974, defendant 1 charged Lots 512 and 513 to the Chase Manhattan Bank and, on 5 April 1982, he

applied for their conversion to building land and for their subdivision into fifty-five bungalow lots and a lot for a condominium of sixty units. These acts were said to be fraudulent. As to the one sublot (of the forty-one) that we have left out, sublot 37, in 1984 the buyer sold it to defendant 1. Paragraph 2 of the amended statement of claim grouped the buyers of the forty-one lots, namely, the twenty-nine plaintiffs, defendants 4, 5 and 6 and defendant 1 (buyer of sublot 37), under the description of "the purchasers". A B

[3] The plaintiffs maintained in the statement of claim that defendant 1 was the constructive trustee of Lots 512 and 513 for the purchasers. They sought a declaration to that effect and an order that defendant 1 perform all the vendors' obligations under the forty (or forty-one) sale and purchase agreements. One of the grounds set out in the amended statement of claim in support of the claim that defendant 1 was a constructive trustee of Lots 512 and 513 for the purchasers was that the registration of the land in the name of defendant 1 only and not in the names of all the three vendors was null and void. So, it was contended, defendant 1 held Lots 512 and 513 as constructive trustee for the purchasers. C D E

[4] It is to be noticed that through the declaration that they sought the plaintiffs were claiming beneficial ownership of the entire Lots 512 and 513 and they were claiming it as a body for all the purchasers, their argument being, as reflected in para. 10 of the amended statement of claim, that since all the forty-one sublots that Lots 512 and 513 comprised had been sold to the purchasers, then it was the whole of Lots 512 and 513 that had been sold to the purchasers. The plaintiffs' approach apparently was to make the declaration of trusteeship of Lots 512 and 513 the basis for the order of specific performance that they sought in respect of the sublots for the benefit of the purchasers individually. F G

[5] The following is a summary of the essential points and defences raised in defendant 1's amended statement of defence. There were sale and purchase agreements for thirty-five sublots only, not forty-one, because there was no agreement with plaintiffs 19 and 23, because plaintiffs 25 and 26 bought one lot jointly as did defendants 4 and 5, and because the agreement with plaintiff 29 had been mutually revoked. Lots 512 and 513 were registered in the name of defendant 1 only because defendants 2 and 3 had H I

A relinquished their rights to defendant 1. Defendant 1 terminated most of the sale and purchase agreements because the buyers had been in breach by failing to pay in full the purchase price and other sums due under the agreements. As undertaken, applications for conversion of category of land use and for subdivision into
B forty-one lots had been made but there had been no decision yet on the applications. As to the charging of Lots 512 and 513 to the Chase Manhattan Bank, defendant 1, as registered owner, had the right to do so. As to the application of 5 April 1982, the subdivisional scheme was merely an alternative to the first (for 41
C sublots), which had not been withdrawn or cancelled. As to defendant 1 being constructive trustee of Lots 512 and 513 for the purchasers, the requirements for the creation of a constructive trust had not all been satisfied. Defendant 1 contended that the plaintiffs' action was premature and misconceived because
D according to the sale and purchase agreements the sublots were to be transferred to those of the purchasers who had complied with the terms thereof only after individual titles to the sublots had been issued, whereas conversion of the category of land use and subdivision had not yet been approved. Limitation and laches were
E also raised.

[6] The amended statement of defence was met with a thorough amended reply. Our purpose in setting out the pleadings, which is to show the nature of the dispute between the parties and the
F main issues that were involved, does not necessitate the setting out of a summary of the reply, except as to one point. In response to the defence contention that the purchase price had not been paid in full, paras. 15(2) and 22(3) of the amended reply averred that, as required by the agreements, the purchase price
G was paid to Messrs Kirpal Singh Brar, the vendors' solicitors, that the other two vendors (defendants 2 and 3) had admitted in their respective statements of defence that the purchase price had been paid in full, that Mr. Kirpal Singh Brar of the said firm "absconded from Malaysia" in 1976, that shortly after that defendant 1 gave
H notice to the purchasers that he had not received the balance of the purchase price, and that it was by that notice that the plaintiffs first had notice of defendant 1's fraudulent intention.

[7] The trial commenced on 15 November 1988. The defence
I witnesses gave evidence first. There were three of them, two being defendants 2 and 3. Defendant 1 did not give evidence. Twenty-two witnesses gave evidence for the plaintiffs. After hearing submissions on 13 May 1994 the learned judge reserved

judgment. Almost three years later, on 23 January 1997, the statement of claim was amended. Submissions resumed and on 12 August 1998 judgment was reserved. On 15 May 2000 the learned judge gave judgment for specific performance of the sale and purchase agreements for plaintiffs 1 to 28 against defendants 1, 2 and 3, although the plaintiffs sought the remedy against defendant 1 only. The judge did not make the declaratory order. No grounds were given. Plaintiff 29 was excluded probably because the judge, after hearing the evidence, accepted defendant 1's averment that the agreement involving plaintiff 29 had been mutually revoked.

[8] The judgment gave rise to three appeals: one by defendant 1 (No. 287); one by defendants 2 and 3 (No. 288); and one by defendants 4, 5 and 6 (No. 289). Plaintiff 29 having been excluded from the benefit of specific performance, the respondents in each of the three appeals were plaintiffs 1 to 28. The complaint of defendants 4, 5 and 6 was that, they being among the purchasers, specific performance should have been ordered for them as well against defendants 1, 2 and 3. So in appeal No. 289 defendants 1, 2 and 3 became respondents 29, 30 and 31 in addition to the twenty-eight plaintiffs who were respondents 1 to 28. As to why those three persons became defendants and not plaintiffs, page 197 of the notes records Mr. Gill, counsel for some of the plaintiffs, as stating that they were named as defendants because they could not be located, that is, we take it, when the twenty-eight (or twenty-nine) plaintiffs were making preparations to sue. If that is true, our guess is that the plaintiffs found it necessary to make them parties because the declaration of trusteeship that they sought concerning Lots 512 and 513 would affect the interests of the three persons as well, but since they could not at the time be located to join up with the plaintiffs, the way to make them parties was to make them defendants.

[9] It was defendant 1's appeal (No. 287) that we heard. There were no grounds of judgment, the trial judge having gone on retirement soon after delivering his judgment, without preparing them. In his submission in the appeal, the sole aim of learned counsel for the appellant (defendant 1), Mr. Tommy Thomas, was to persuade the court of the need for a new trial of the action resulting from the absence of the judge's grounds of judgment. Counsel for the appellants in the other two appeals also participated in the hearing of appeal No. 287 since if, on that appeal, a new trial was ordered the order would affect all parties.

A Since there was nothing else advanced in submission in support of the appeal, the result would be that if we disagreed with the plea for a retrial, the appeal must be dismissed.

[10] It was not Mr. Tommy Thomas's contention that in law B where no grounds of judgment are available for a civil appeal there must be a new trial. He had not been able to find any reported decision in Malaysia or England "where absence or lack of grounds of judgment by a trial judge resulted in comments by an appellate court". He could only rely on three cases where the C grounds were available but there had been delay in their release or paucity of thinking in them and, he said, for either of those shortcomings the appellate court had criticized the court of first instance. The three cases are *Tan Hun Wah v. Public Prosecutor* [1994] 2 CLJ 181, *Flannery v. Halifax Estate Agencies Ltd* [2000] 1 D All ER 373, and *English v. Emery Reimbold & Strick Ltd* [2002] 2 All ER 385. It would follow, reasoned Mr. Tommy Thomas, that the appellate court would harshly criticize a trial judge who did not at all produce his grounds of judgment. (See paras. 3 and 8 of his written submission). That may be so, but the question before E us was not one of criticism but one of ordering a new trial. Justification for criticism need not also be justification for ordering a new trial.

[11] A similar kind of flawed reasoning was also apparent in F paras. 21 and 22 of the concluding part of the written submission, where it was submitted that because the absence of written reasons makes it "impossible for an appellate court to determine how the trial judge discharged the vital function of appreciating evidence", his decision is "unsafe" and because the decision is G unsafe it is fitting and proper that a new trial be ordered under s. 71(1) of the Courts of Judicature Act 1964. Where a judge does not state his reasons for arriving at his decision, the decision is not necessarily unsafe. He may have properly considered and weighed the evidence and may have arrived at the right H conclusions. The decision is only unsafe in the sense that the appellate court is unable to determine, from an assessment of the judge's mental processes, that the decision is correct. But it does not follow that the course open to the appellate court to decide the appeal while doing justice is to order a new trial. It is still I open to the appellate court to assess the evidence and come to a finding whether or not the evidence vindicates the decision of the trial judge.

[12] Where, in an appeal in a civil matter, as in this appeal, reasons for the decision appealed against are not available, and not obtainable, the appeal, onerous though this may be, should proceed on an examination and assessment of the evidence to enable the appellate court to decide whether the evidence justifies the decision or otherwise. It will be as if the appellate court is sitting at first instance, except that the evidence is already before it. For reasons that are obvious or can easily be imagined, a new trial is undesirable and ought not to be ordered unless there is something crucial to a just decision in the case that can be established in the new trial but cannot be established on an assessment of the evidence. The evidence being all there already, such a thing must be very rare indeed. One that readily comes to mind is credibility in a situation where there is only the testimony of witnesses to rely on, being non-expert witnesses, and the testimony on one side appears to be equally cogent as the conflicting testimony on the other side. In such a case it may be said that a new trial is necessary so that the new trial judge will, as the appellate court will not, be able to observe the demeanour of the witnesses and credit the version of him whose demeanour is more reassuring. Even so, a correct decision may be frustrated if the opportunity to testify again gives to the witness whose testimony is not true an opportunity to improve his deportment.

[13] We excluded expert witnesses from the discussion just now because the differences between experts are of an intellectual nature, with reason and analysis to support an opinion, so that an appellate court may, without the aid of demeanour, be able to decide which opinion to accept. This is suggested by *Flannery v. Halifax Estate Agencies* [2000] 1 All ER 373, one of the three cases cited by Mr. Tommy Thomas. It was a claim by the purchaser-owners of a flat against valuers. "At trial", says the headnote, "the case turned entirely on a dispute between the rival expert witnesses concerning the cause of cracks in the property's superstructure. Without providing any reasons for his decision, the judge stated that he preferred the evidence of the valuers' expert witness, and accordingly dismissed the claim". The Court of Appeal, in ordering a retrial, said:

> It should not be assumed that the court that (for whatever reason) failed to give reasons had no reasons. Here, for example, it seems likely that the judge believed he had said enough. In that we differ from him. But one alternative remedy to quashing the decision is to invite or require the court to give reasons (see where this is

A done in the administrative law context – *de Smith, Woolf and Jowell* pp 469-470 (paras 9-054-9-055)). We considered that here. But by the time we were seised of the case, more than a year had passed since the hearing. It would not have been realistic for the judge to reconstitute his reasons. But, in accordance with the new
B practice direction on leave to appeal, leave should be sought from the trial judge immediately after judgment is delivered. On the application for leave, if a 'no reasons' point is being taken, the potential respondents should consider inviting the judge to give his reasons, and his explanation as to why they were not set out in the judgment, in an affidavit for use at the leave application and
C at the hearing if leave be granted.

Accordingly, we do not regard this as an appropriate case to remit to the trial judge. Nor have we the evidence before us necessary to form our own view – for instance, we do not have the transcripts of the experts' evidence. Accordingly, we have no
D alternative but to allow the appeal, set aside the judgment, and order a new trial.

The thing to be noted from that passage is that if the Court of Appeal had the evidence, such as the transcript of the experts'
E evidence, they would have formed their own view and decided the appeal accordingly instead of ordering a new trial.

[14] In his written submission, the question that Mr. Tommy Thomas contended necessitated a new trial was dealt with in Part
F B (paras. 10 to 19). It was about the capacity of Mr. Kirpal Singh Brar, on which Mr. Tommy Thomas had said in his oral submission that the whole case turned. According to para. 12 of the written submission, in face of defendant 1's denial of receipt of full payment of the purchase price, the plaintiffs alleged that
G they made payment to Mr. Kirpal Singh Brar who, in 1976, absconded, and this dispute as to the making of full payment raised issues as to whether full payment was in fact made to Mr. Kirpal Singh Brar, whether payment to Mr. Kirpal Singh Brar instead of to defendant 1 direct had been authorized by defendant
H 1, and whether Mr. Kirpal Singh Brar, in receiving the payment, was acting as the agent of the purchasers or as the agent of defendant 1. The oral and written submissions of Mr. Tommy Thomas referred to certain pieces of evidence pertaining to those issues, with the comment that in the absence of the judge's
I reasons it was not known how he evaluated the evidence. But there was no attempt to show why this court would not be able to resolve those issues by an assessment of the evidence. In fact, from the last sentence of para. 9 of the written submission it

appeared that the objective in treating of the question of payment to and capacity of Mr. Kirpal Singh Brar in Part B of the written submission was to show that "written grounds were essential and the failure by the trial judge to give them was highly prejudicial to the parties and to the Court of Appeal." Of course written grounds were essential, of course without them the appellant was deprived of the knowledge of the manner in which the judge weighed the evidence, and of course that was prejudicial to the appellant, but, as we said, that did not make a new trial inevitable. There was the alternative of assessment of evidence by the appellate court, as to which Mr. Tommy Thomas only said, and that was in his oral submission, that it would involve going through 200 pages of testimony and that it was not the duty of the Court of Appeal to examine the evidence in minute detail.

[15] All in all we did not find that Mr. Tommy Thomas had justified the appellant's plea for a new trial. It followed that the appeal had to be dismissed. We therefore dismissed the appeal with costs and ordered that the deposit be paid to the respondents towards account of taxed costs. We also gave liberty to the respondents to apply to the High Court for ancillary orders in respect of the relief of specific performance. As to appeals No. 288 and No. 289, we adjourned them to a date to be fixed.